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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-5912

DONALD EUGENE HARDING,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE ARIZONA SUPREME COURT

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II. WAS THE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL TRIAL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS, VIOLATED BY THE ARIZONA SUPREME COURT AFFIRMING THE ADMISSION OF CERTAIN PHOTOGRAPHS?

III. WAS THE PETITIONER'S RIGHT OF SELF-REPRESENTATION, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS, VIOLATED BY THE ARIZONA SUPREME COURT AFFIRMING THE SHACKLING OF THE PETITIONER?

CITATION OF OPINION BELOW

State of Arizona v. Donald E. Harding, ___ Ariz. ___, 670 P. 2nd. 383 (1983), motion for rehearing denied on October 12, 1983. Warrant of Execution issued on October 19, 1983.

A copy of the opinion from which this Petition for Certiorari is sought is appended hereto as Exhibit "A".

STATEMENT OF JURISDICTION

This petition for certiorari is taken from the Arizona Supreme Court's affirming the Petitioner's corviction and sentencing the Petitioner to death. The Arizona Supreme Court denied Petitioner's motion for rehearing and issued a warrant of execution for December 14, 1983. This court has jurisdiction in 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES
U.S. CONST. Amends. VI and XIV

STATEMENT OF THE CASE

The history of this case is as follows:

1. On January 29, 1980, the Pima County Attorney's Office, State of Arizona, charged the Petitioner, DONALD EUGENE HARDING, by indictment with the following crimes: two counts of murder in the first degree; two counts of armed robbery; two counts of kidnapping; and one count of theft over $1,000. On April 21, 1982, Petitioner was tried before a jury. On April 26, 1982, Petitioner was found guilty of all charges.

2. The court sentenced the Petitioner on May 26, 1983, as follows: to a term of twenty one (21) years on each count of armed robbery, such terms are to run consecutively to each other; to a term of twenty one (21) years on each count of kidnapping, such terms are to run consecutively to each other; to a term of five (5) years on the theft; and as to the two counts of first degree murder, defendant is sentenced to death, such death sentences to run consecutively to each other (CC No. 226).

3. Petitioner's conviction and sentence were affirmed by Arizona Supreme Court, State v. Harding, ___ Ariz. ___ 670, P. 2d. 383 (1983); rehearing denied October 12, 1983.

4. Petitioner was sentenced to death, and in the opinion attached hereto as Appendix "A", Supreme Court affirmed that sentence.

5. Petitioner raised the issues set forth in this petition in his appeal to the Arizona Supreme Court.

6. Petitioner requests in this petition for an order reversing his conviction and sentencing and remanding it for a new trial.

REASONS FOR GRANTING THE WRIT

A. UNIQUENESS OF PETITIONER'S CASE

A conflict exists between the Federal Appellate Court and the Arizona Supreme Court in relation to their respective interpretations of this court's decision in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d. 561 (1975). In Wiggins v. Estelle, 681 F. 2d. 266 (5th Cir. 1982), rehearing denied 691, F. 2d. . Cert. granted ___U.S.___. ___S. Ct.___. 75 L. Ed. 2d. 430 (1983), the court held that court appointed standby counsel violated the defendant's right of self-representation by participating in the trial. The court stated:

> "Therefore, the rule that we establish today is that court-appointed standby counsel is to be seen, but not heard. By this we mean that he is not to compete with the defendant or supercede his defense. Rather, his presence is there fore advisory purposes only, to be used or not used as the defendant sees fit." 681 F. 2d at 273, 274

In State v. Harding, ___ Ariz.___, 670 P. 2d. 383 (1983), the Arizona Supreme Court affirmed the trial court's order that directed Petitioner's advisory counsel to prepare jury instructions and the settling of jury instructions since the court did not feel that this violated Petitioner's right of self-

representation. The conflict arises out of what is the role of an advisory counsel.

In the present case, Arizona Supreme Court in affirming the trial court's order requiring the Petitioner's advisory counsel to participate in the trial violated the standard set forth in Faretta which determined whether an accused can represent himself. In essence, the trial court's determination is similar, if not identical to, the rationalization applied by the California trial court in Faretta.

Furcher, Petitioner was denied his Sixth Amendment right to a fair trial and due process of law, as guaranteed by the Fourteenth Amendment by the Arizona Supreme Court in affirming the trial court's admission of the gruesome photographs. In Harding, the court stated they would have considered reversing his conviction, if he had maintained his objection. The language quoted in their opinion was a misstatement of the trial transcript. The Arizona Supreme Court had backed itself into a corner by their admission that the photographs were prejudicial and as such would deny Petitioner a fair trial. In Petitioner's Motion for Rehearing, Petitioner attached, as an exhibit, approximately twenty-six pages of the respective transcript which demonstrated, beyond a shadow of a doubt, that the Arizona Supreme Court was in error. They chose to respond by a one sentence - motion denied.

It is, therefore, in light of the truly unique posture of this case that the constitutional issues presented in this petition must be examined.

B. In Faretta v. California, 422 US 806, 95 S. Ct. 2525, L. Ed. 2d. 561 (1975), the trial judge allowed the defendant to represent himself. Subsequently, the trial judge reversed his prior ruling which granted the defendant the right to handle his own case. The trial judge believed that the accused did not understand the rules of evidence, the rules of criminal procedure and criminal law, and

as such, the accused could not make an intelligent and knowing waiver of the right to assistance of counsel. This court reversed the California Supreme Court's affirmance of the trial judge's refusal to allow accused to represent himself. In reversing this court stated:

> "For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."

In the present case, the trial court found that the Petitioner had made a knowing and intelligent waiver of his right to counsel. Petitioner was permitted to handle the entire evidentiary portion of the trial. Midway through the Petitioner's trial the judge ordered that advisory counsel prepare jury instructions. Petitioner strongly objected to this procedure. Petitioner objected to advisory counsel participating in the settling of jury instructions.

The Arizona Supreme Court's affirmance of the Petitioner's conviction violates both the spirit and letter of Faretta v. California, supra. The Arizona Supreme Court has established two mutually inconsistent standards for determining whether the Petitioner can knowingly, intelligently and competently waive his right to assistance of counsel and represent himself. The trial court made a determination that the defendant waived his right to assistance of counsel. The trial court allowed the Petitioner to conduct the entire evidentiary portion of the trial which the Petitioner believes is the most critical stage of the trial. The Arizona Supreme Court legitimized the trial court's termination of the Petitioner's self-representation. Petitioner assumed that the trial court made a determination that the Petitioner did not have sufficient skills to prepare jury instruction. When the Petitioner questioned the trial court concerning it's decision, a very interesting exchange took place (See Exhibit B , attached). The trial court's action violated the letter of the law, as set forth by Faretta, since a trial court cannot inquire as to the Petitioner's

legal knowledge of the relevant statutes, relevance or procedure. The Petitioner would be held to the same standards as an attorney. The Arizona Supreme Court's rule is that if a trial court finds that a defendant is not properly handling his defense, then the trial court can unilaterally revoke the Petitioner's waiver of assistance of counsel without conducting a separate hearing.

The Arizona Supreme Court's affirmance of Petitioner's conviction conflicts with the Fifth Circuit's decision, Wiggins v. Estelle, supra. In Wiggins, the court held the defendant's right of self-representation was violated by the fact that the trial court sanctioned advisory counsel's interference and took an active role in the trial. In the present case, advisory counsel acquiesced to the trial court's abrogation of the Petitioner's right of self-representation. The trial court's curtailment of Petitioner's right of self-representation is no less a violation than the activities of standby counsel in Wiggins. It can be reasonably aruged that the actions, of trial court in Petitioner's case and standby counsel in Wiggins, were based on protecting the Petitioner's interests, yet their respective conduct is still no less a violation of the individual's right of self-representation. In Justice Blackman's dissent to Faretta, he stated:

> "May a violation of the right to self-representation ever be harmless error?" Perhaps the best authority for the proposition that a denial of the right to conduct one's own defense will always be reversible error is Faretta itself." 75 L. Ed. 2d. at

Petitioner believes that a trial court can terminate the right of self-representation when the defendant's conduct creates a disturbance which is of such a nature that it interferes with the orderly process of the trial. Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d. 353 (1970); People v. Colbert, 192 Cal. Rptr. 836, 164 Cal. App. 3rd. 719 (1983); People v. Krom, 458 N.Y.S. 2d. 693, 91 A. D. 39 (Sup. App. 1983). The Petitioner was not guilty of this type of conduct.

In light of the above quotation, Petitioner believes that any deprivation of the Sixth Amendment right of counsel will mandate reversal of a conviction even in the absence of a showing that the resulting prejudice affected the outcome of the case. Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1941); United States v. Golub, 638 F. 2d. 185 (10th Cir., 1980); United States v. King, 664 F. 2d. 1171 (10 Cir. 1981). As such, Petitioner's conviction and sentence must be reversed and remanded for a new trial.

C. The Arizona Supreme Court erred in affirming the trial court's admission of the gruesome photographs since it precluded the Petitioner from having a fair and impartial trial and due process of law. In Harding, the court stated:

> "The defendant, after first objecting to the admission of the photographs in evidence, stated, 'I would like to move to admit them all so we can proceed. *** I withdraw my objection'." 670 P. 2d. at

Petitioner's statement is taken out of context. The statement occurred on the offering of the State's Exhibit No. 21 of 107 photographs. The entire dialogue presents an entirely different picture than presented by the Arizona Supreme Court's opinion. Petitioner's advisory counsel maintained the objection for the Peititoner. (See Exhibit C , attached)

The trial court did not accept the waiver of the objection. This is self-evident by reading ths trial transcript in this case. Ironically, the trial court made an individual determination as to admissibility of each and every photograph from No. 22 through No. 107.

In Harding, the court stated:

> "We have no hesitancy in stating that had the defendant maintained a valid objection, we would consider reversing the conviction, because the prejudice of several gruesome photographs among the over 90 admitted outweighed their probative value. We believe that counsel, by 'overtrying' his case, could well have placed the conviction in jeopardy." 670 P. 2d. at

Obviously, the Arizona Supreme Court felt that these pictures were prejudicial in nature. Petitioner did not receive due process of law and a fair trial. These photographs were introduced with the intention of inflaming the passions and prejudices of the jury. These photographs would add little, if anything, to prove the State's case. This can lead a jury to convict the Petitioner because of the jury's revulsion rather than from the State's proving the elements of the crime.

In the alternative, Petitioner believes that the Arizona Supreme Court committed fundamental error in affirming the trial court's admission of the photographs.

In State v. Smith, 114 Ariz. 415, 561, P. 2d. 739 (L977), the Arizona Supreme Court defined fundamental error as:

> "Fundamental error is error of such dimensions it cannot be said it is possible for a defendant to have had a fair trial. It usually, if not always, involves the loss of federal constitutional rights." 114 Ariz. at 420

Petitioner believes that the admission of the photographs constitutes fundamental error. The Arizona Supreme Court stated that the gruesome photographs were prejudiced and that they would consider reversing the conviction. The Court's definition in State v. Smith, supra, is predicated upon the due process clause of the Fourteenth Amendment and the Sixth Amendment right to fair trial. In support of Petitioner's contention, the case of State v. Steele, 120 Ariz. 462, 586 P. 2d. 1274 (1978) was helpful. The trial court admitted the victim's bloody shirt over the Defendant's objection. The Arizona Supreme Court reversed the conviction because the bloody shirt would arouse and inflame the emotions of the jury. In Petitioner's case, the Arizona Supreme Court stated they found no fundamental error. Arizona Supreme Court's failure to find that the admission of the gruesome photographs was fundamental error violated Petitioner's Sixth Amendment right to a fair trial and due process clause of the Fourteenth Amendment.

D. The Arizona Supreme Court's affirmance of the trial court's order which required the Petitioner to be shackled during jury selection and his trial. The Petitioner cited to the Arizona Supreme Court the case of People v. Burnett, 168 Cal. Rptr 833, 111 Cal. Rptr., 3d., 631 (1980) which they totally ignored. In Burnett, the Court reversed the defendant's conviction because his Sixth Amendment right to self-representation was violated by the trial court's order that the defendant remain shackled during the trial. The Court stated that the shackles may have both interfered with the defendant's mental faculties and prejudiced the minds of the jury. The Court stated that the record reflected that on numerous occasions the prosecutor approached the witnesses with exhibits and photographs and that he undoubtedly stood and faced the jury during voir dire, opening statement and closing argument. The court stated:

> "While a defendant who represents himself cannot expect or demand to be on an equal educational or professional footing with counsel for the People, unnecessary restrictions on his efforts to represent himself should not be imposed by the trial court. The limitations inherent in self-representation are burdensome enough, without the imposition of unwarranted additional restraint by the court". 168 Cal. Rptr. at 838

There is conflict between the Arizona courts and California courts concerning what constitutes an infringement upon the defendant's right of self-representation. The Arizona Supreme Court suggested that the Petitioner does not have a right to walk about the courtroom during the trial. The Arizona Court's statement is in direct conflict with the law of California. From this court's decision in Faretta v. California, supra, it would appear that a defendant should have the same rights that would be given to his counsel. It appears that the Petitioner was denied equal protection under the law while he acted in the capacity of an attorney as he was conducting his own defense. In Arizona, attorneys are permitted to walk around the courtroom. The underlying theory of

People v. Burnett, supra, was the affirmation of equal protection clause of the Fourteenth Amendment.

Further, Petitioner believes that the Arizona Supreme Court's affirming the trial court's order for shackling of the Petitioner was an abuse of discretion. The Petitioner requested that the shackles be removed. The trial judge indicated that there could be some danger if Petitioner was not shackled in the courtroom. The Petitioner and the trial judge had an interesting colloquy, which is attached hereto as Exhibit D. The basis of the court's ruling was the threatened violence to advisory counsel. Petitioner had specifically requested that one not be appointed, but his request was denied. [It would appear that the shackling of the Petitioner was unreasonable interference of his right of self-representation.]

In light of Exhibit D, it would appear that there is no rational basis which would justify the shackling of the Petitioner. Petitioner's right of self-representation was violated by being unable to do the following activities which were afforded to the Deputy County Attorney: to be able to approach the witnesses; to move about in the courtroom; and to stand up when addressing the jury. The Petitioner elected not to make a closing argument because he was forced to sit at the table. Obviously, the court ordered shackling inhibited and interfered with his right of self-representation. The Arizona Supreme Court's affirming the trial court's order violated the Petitioner's Sixth Amendment right of self-representation and the equal protection clause of the Fourteenth Amendment.

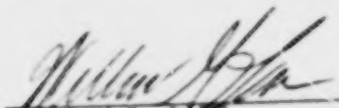
CONCLUSION

Petitioner requests that the petition for certiorari be granted.

RESPECTFULLY SUBMITTED this 9 day of December, 1983.

Law Offices

SCHWANBECK, LANE & PRESENT

BY: 

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ORIGINAL

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THE STATE OF ARIZONA,
Respondent.

83-5912

NO. A-87

(Arizona Supreme Court No. 5587)

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Donald Eugene Harding, who is now held in Arizona State Prison, asks leave to file the attached Petition for a Writ of Certiorari to the Arizona Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The petitioner's affidavit in support of this motion is attached hereto.

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83-5912

NO. A-87

(Arizona Supreme Court No. 5587)

AFFIDAVIT

I, DONALD EUGENE HARDING, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the petitioner in the above-entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said case. 5. The nature of said cause is briefly stated as follows:

I was sentenced to the Arizona State Prison on the following crimes: two counts of murder in the first degree; two counts of armed robbery; two counts of kidnapping; and one count of theft. The present proceeding was commenced by filing a petition for Writ of Certiorari, as permitted under 28 U.S.C. §12573, on the following grounds: that my right of self-representation was interfered with by the trial court; that my conviction and sentence was obtained in violation of the due process clause of the Fourteenth Amendment, by the admission of gruesome and prejudicial pictures and that my death sentence violates the Eighth and Fourteenth Amendments of the United States Constitution.

Donald Eugene Harding
DONALD EUGENE HARDING

STATE OF ARIZONA)
) ss.
COUNTY OF PINAL)

, Duly witnessed and sworn to before me, a Notary Public, this 1 day of December, 1983.

Notary Public

My Commission Expires:

April 20 1984

EXHIBIT A

State v. Harding, ____ Ariz. ____, 670 P. 2d. 383 (1983)

Cite as 670 P.2d 383 (Ariz. 1983)

STATE of Arizona, Appellee,

v.

Donald Eugene HARDING, Appellant.

No. 5587.

Supreme Court of Arizona,
In Banc.

Sept. 6, 1983.

Rehearing Denied Oct. 12, 1983.

Defendant was convicted in the Superior Court, Pima County, Cause No. CR-02597, Harry Gin, J., of two counts of first-degree murder, two counts of robbery, two counts of kidnapping, and theft of property valued in excess of $1,000, and he appealed. The Supreme Court, Cameron, J., held that: (1) defendant was not denied effective assistance of counsel during pretrial period; (2) defendant made knowing and intelligent waiver of right to counsel; (3) statements made to police were admissible; (4) trial court did not abuse its discretion in shackling defendant at trial; (5) testimony of prior robbery victim was admissible under "modus operandi exception" to rule prohibiting admission of evidence of other crimes; (6) defendant's right of self-representation did not give him power to exclude his advisory counsel from participating in settling of instructions; and (7) aggravating circumstances and lack of mitigating circumstances justified imposition of death penalty, which was not excessive or disproportionate to penalty imposed in similar cases.

Affirmed.

Gordon, V.C.J., filed specially concurring opinion.

Feldman, J., filed specially concurring opinion.

1. Criminal Law ⇐641.13(3)

Performance of public defenders prior to defendant's undertaking to present his own defense did not fall below standard of minimum competence, and therefore defendant was not denied effective assistance of counsel during pretrial phase. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(2)

Failure on part of public defenders to file timely motion for change of judge lost defendant right to peremptorily remove judge pursuant to rule, so that defendant had to rely upon removal for cause; however, that failure did not indicate that counsel's performance fell below minimum professional competence standard, because there was no showing that change of judge was critical in case, since facts did not support conclusion that judge was biased as predisposed to giving death penalty. 17 A.R.S. Rules Crim.Proc., Rules 10.1, 10.2.

3. Witnesses ⇐2(1), 79, 266

Defendant's constitutional rights to compulsory attendance of witnesses and cross-examination were not violated when trial court denied his motions to recuse prosecutor, and to call prosecutor as witness on basis that he had been present at time some of defendant's statements were taken, where prosecutor avowed that at no time in his contacts with defendant was he unaccompanied by other police authorities, and prosecutor's avowals to court were corroborated by one of the detectives present at encounters between defendant and prosecutor.

4. Criminal Law ⇐641.6(2)

Because a defendant is competent to stand trial does not mean defendant is competent to waive assistance of counsel. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.6(2)

Trial court did not abuse its discretion in determining that defendant was mentally competent to waive counsel, where in making its determination trial court not only relied on psychiatrists' opinions but also observed defendant's demeanor and heard his responses to inquiries about procedural matters posed by court, and where record reflected that defendant was articulate and that he clearly and forcefully expressed his desire to represent himself. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.6(2)

Mere diagnosis of mental disease or disorder does not mean that defendant is unable to make rational decisions regarding his case.

7. Criminal Law ⇐641.4(4)

Record, including proof that defendant's educational level and his familiarity with rules of procedure in criminal matters were established at hearing, that trial court advised defendant that case was complex and serious and inquired of defendant whether in such circumstances he was certain he wanted to represent himself, to which defendant affirmatively replied, and that trial court advised defendant that point of having advisory counsel during trial was that he would be ready to act in case defendant decided that he was in "too deep of water" to continue, complied with federal and state standards requiring knowing and intelligent waiver of right to counsel and assertion of right to self-representation. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐641.4(4)

Where it was clear that defendant was advised of charges and possible death penalty and was reminded of complexity of proceedings and advantage of advisory counsel, but despite those warnings, defendant waived counsel, that waiver was valid, notwithstanding that it was not in writing as required by state rule of criminal procedure. 17 A.R.S. Rules Crim.Proc., Rule 6.1, subd. c; A.R.S. Const. Art. 2, § 24.

9. Searches and Seizures ⇐7(10)

There is no expectation of privacy meriting constitutional protection in license plate affixed to exterior of one's motor vehicle driven in public. U.S.C.A. Const. Amend. 4.

10. Automobiles ⇐349

By time defendant was stopped by police for purposes of effecting his arrest, officers knew that vehicle defendant was driving had been reported as stolen and possibly involved in double homicide; therefore, police had probable-cause to arrest defendant.

11. Criminal Law ⇐412.1(4)

Defendant's statement about his "deserving" his fate was admissible, notwithstanding that it was made after defendant was read his *Miranda* warnings and he stated that he had nothing to say, because statement was not in response to any questions or prompting by authorities, but was merely response to an officer's attempt to shield defendant from airport winds by sharing his jacket, so that it was made as result of conversation initiated by defendant. U.S.C.A. Const.Amends. 5, 6.

12. Criminal Law ⇐412.1(4)

Defendant's statement, in response to being advised by detective that clothing seized from defendant upon his arrest was being held as evidence, that something unable might be found on burgundy shirt and shoes that he had been wearing, but that other clothing had not been worn, was admissible, notwithstanding that it was made after defendant had been read his *Miranda* warnings and had stated that he had nothing to say, because conversation began when defendant asked if he could have some of his clothing returned to him, and statement in question was not in response to any interrogation or attempt by police not to scrupulously honor defendant's right to remain silent. U.S.C.A. Const.Amends. 5, 6.

13. Criminal Law ⇐637

It is within sound discretion of trial court whether to have prisoner shackled at trial.

14. Criminal Law ⇐637

Where defendant threatened bodily harm to his appointed advisory counsel and to any other attorney who might subsequently act in that capacity, and where court was aware of that threat and fact that defendant was disposed to violence in view of recent episodes of assaultive behavior of defendant while in custody, trial court did not abuse its discretion in shackling defendant at trial.

15. Criminal Law ⇐637, 641.4(3)

Defendant who was representing himself did not thereby have a constitutional right, attendant upon his right to self-representation, to walk about courtroom during trial so as to compel finding that his being shackled violated his constitutional rights to self-representation and fair trial.

16. Criminal Law ⇐369.15, 372(4)

In prosecution for first-degree murder, robbery, kidnapping and theft of property, testimony of victim of alleged previous robbery committed by defendant was admissible under "modus operandi exception" and "common scheme exception" to rule prohibiting admission of evidence of other crimes, wrongs or acts, because in most important aspects similarities between offenses were so striking as to prove identity of killer of instant victims, and because prior victim's testimony, when coupled with that of arresting officer and investigating detective, strongly suggested identity and common scheme or plan. 17A A.R.S. Rules of Evid., Rule 404(b).

17. Criminal Law ⇐339.5

In prosecution for first-degree murder, robbery, kidnapping and theft of property, testimony of victim's widow about visit to her home on evening of murders by man she positively identified as defendant was admissible as tending to prove identity of murderer, since defendant appeared at her door holding one of her husband's business cards, defendant was discovered in possession of victim's briefcase and other personalty at time of his apprehension, and any prejudicial effect of testimony on jury was outweighed by its relevance and probative value. 17A A.R.S. Rules of Evid., Rule 403.

18. Searches and Seizures ⇐7(26)

One must have legitimate expectation of privacy in thing searched in order to have standing to object to validity of search. U.S.C.A. Const.Amend. 4.

19. Searches and Seizures ⇐7(10)

Thief of property has no legitimate expectation of privacy in stolen goods. U.S.C.A. Const.Amend. 4.

20. Searches and Seizures ⇐7(26)

Defendant had no reasonable expectation of privacy in stolen car he was driving when he was apprehended, and therefore was without standing to object to validity of search, under warrant, of car. U.S.C.A. Const.Amend. 4.

21. Criminal Law ⇐1036.1(6)

Generally, without objection to admission of gruesome photographs at trial, issue may not be raised on appeal.

22. Criminal Law ⇐1036.9

Defendant's waiver of objection to admission of photographs of victims was valid, and therefore he could not raise issue on appeal.

23. Criminal Law ⇐641.10(3)

While trial court used some of defense counsel's proposals in instructing jury, instructions were court's, and therefore defendant's right of self-representation was not violated by submission of advisory counsel's instructions on his behalf.

24. Criminal Law ⇐1213.2(2)

Death sentence statute is not arbitrary and capricious relative to notion of mitigation "sufficiently substantive to call for leniency," or to burden of proving mitigating factors; therefore, statute is not violative of prohibition against cruel and unusual punishment. A.R.S. § 13-703; A.R.S. Const. Art. 2, § 15; U.S.C.A. Const.Amend. 8.

25. Criminal Law ⇐1213.2(2)

Death sentence statute is not violative of prohibition against cruel and unusual punishment on basis of prosecutor's authority on decision whether to seek death penalty. A.R.S. § 13-703; A.R.S. Const. Art. 2, § 15; U.S.C.A. Const.Amend. 8.

26. Criminal Law ⇐1208.1(2)

Death sentence statute is not unconstitutional as in violation of Sixth Amendment by failing to involve jury in capital sentencing decision. U.S.C.A. Const.Amend. 6; A.R.S. § 13-703.

27. Constitutional Law ⇐278(1)
Criminal Law ⇐1206.1(2)

Death sentence statute does not violate due process by placing burden of proof of mitigating circumstances on defendant. A.R.S. § 13-703; U.S.C.A. Const.Amends. 5, 14.

28. Criminal Law ⇐1206.1(2)

Legislatively propounded criteria for aggravating circumstances in death sentence statute are not impermissibly overbroad or vague. A.R.S. §§ 13-703, 13-703, subd. F, par. 6.

29. Criminal Law ⇐1134(1)

Supreme Court reviews each death penalty imposed by state's sentencing courts to insure that sentence has not been applied in arbitrary or capricious manner. A.R.S. § 13-703.

30. Criminal Law ⇐1134(1)

Supreme Court independently reviews record of each capital case to determine correctness of findings of trial court as to aggravating and mitigating circumstances, in order to independently determine propriety of sentence imposed. A.R.S. § 13-703.

31. Criminal Law ⇐998.2(4)

Defendant's earlier conviction of dangerous or deadly assault by prisoner supported finding of two aggravating circumstances, namely, conviction of an offense punishable by life imprisonment and conviction of felony involving use of violence on another person, where facts of prior conviction indicated that defendant and another jail inmate struck fellow inmate several times with darts discharged through homemade blowgun, that one dart penetrated victim's jawbone, a second traversed his skin near the shoulder, and a third penetrated his leg, and nurse and forensic pathologist both testified that darts were capable of causing serious physical injury. A.R.S. §§ 13-703, subd. F, pars. 1, 2, 13-1206.

32. Homicide ⇐354

Evidence that defendant removed clothing, a briefcase and credit cards from possession of murder victim, and left scene of homicides in car that had been in custody of another victim, supported finding that defendant committed murders in course of obtaining valuable personal property from his victims, an aggravating circumstance for purposes of imposition of death penalty. A.R.S. § 13-703, subd. F, par. 5.

33. Homicide ⇐354

Where there was no evidence beyond reasonable doubt that victims were conscious, evidence failed to establish that sadistic treatment of victims on part of defendant was especially cruel to the victims, for purposes of aggravating circumstance that murders were committed in "an especially cruel, heinous and depraved manner." A.R.S. § 13-703, subd. F, par. 6.

34. Criminal Law ⇐998.2(1)

State must prove aggravating circumstances beyond reasonable doubt.

35. Homicide ⇐354

Helplessness of murder victims plus gratuitous nature of bludgeoning, beyond point necessary to rob or to dispatch victims by shooting, rendered beating apart from the usual or norm, and it therefore was "depraved" within meaning of aggravating circumstance that murders were committed in "an especially cruel, heinous and depraved manner." A.R.S. § 13-703, subd. F, par. 6.

See publication Words and Phrases for other judicial constructions and definitions.

36. Criminal Law ⇐1208.1(5)

Independent review of death sentence case demonstrated no mitigating circumstances sufficiently substantial to call for leniency in imposition of sentence. A.R.S. § 13-703, subds. C, E.

37. Criminal Law ⇐1206.2(2)

Supreme Court conducts proportionality review to determine whether sentences of death are excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant.

Cite as 670 P.2d 383 (Ariz. 1983)

38. Homicide ⇐354

Aggravating circumstances that prior conviction was an offense punishable in state by life imprisonment, that such conviction was of a felony involving use of violence on another person, that instant murders were committed for pecuniary gain, and that murders were "depraved," plus lack of mitigating circumstances sufficiently substantial to call for leniency, supported imposition of death penalty, and such sentence was not disproportionate to penalty imposed in similar cases. A.R.S. § 13-703, subds. E, F, pars. 1, 2, 5, 6.

Robert K. Corbin, Atty. Gen. by William J. Schafer III, and Jack Roberts, Asst. Attys. Gen., Phoenix, for appellee.

William Lane, Tucson, for appellant.

CAMERON, Justice.

The defendant appeals his first degree murder convictions and consecutive sentences of death, which were imposed consecutively to sentences for two convictions of robbery, two convictions of kidnapping and one conviction for theft of property valued in excess of $1000. We have jurisdiction under A.R.S. § 13-4031 and Ariz. Const. art. 6 § 5(3).

The defendant raises fifteen issues in this appeal, which may be grouped into three categories. The first is pre-trial issues:

1. Was the defendant denied effective assistance of counsel during the pre-trial period?
2. Did the trial court err in denying the defendant's motion to recuse the prosecutor?
3. Did the trial court err in its method of determining if the defendant was competent to waive his right to counsel?
4. Did the defendant make a proper waiver of his right to counsel?
5. Did the trial court err in denying the defense motion to suppress evidence based on a policeman's investigation of the license plate of the automobile the defendant drove when arrested?
6. Did the trial court err in denying the defense motion to suppress certain post-arrest statements made by the defendant?

The second category of issues raised by the defendant relates to decisions of the court during trial, including:

7. Was it error to keep the defendant in leg shackles during the trial?
8. Was it error to admit the testimony of a former robbery victim of the defendant?
9. Was it error to admit into evidence the items found in the car that defendant was driving at the time of his arrest?
10. Was it error to admit some 71 large color photographs of the victims into evidence?
11. Was it error to order the defendant's advisory counsel to submit jury instructions over the objection of the defendant?

The final category of issues concerns the validity of our method of determining the propriety of the death penalty, including:

12. Does the death penalty statute violate the eighth amendment's prohibition against cruel and unusual punishment?
13. Is it improper for any entity other than a jury to determine aggravating and mitigating circumstances?
14. Is it unconstitutional to require the defendant in a capital case to prove mitigation?
15. Is our death penalty statute void-for-vagueness for lack of definition of the standard "especially cruel, heinous and depraved"?

The facts necessary for a determination of the issues presented here are these. Robert A. Wise, district supervisor for KAR Car Products Incorporated, left Mesa, Arizona on 24 January 1980 to meet with Martin L. Concannon, the corporation's area sales representative in Tucson. Wise checked into a Tucson motel that evening.

and on the following day accompanied Concannon on sales calls in southern Arizona. The two men returned to Wise's motel in the late afternoon of 25 January 1980.

Their bodies were discovered in Wise's motel room the following morning. Robert Wise was found on the floor next to the bed, tethered to a bedpost by a restraint wrapped around his neck. He had been bound with his hands behind his back, with his ankles tied together and secured to the hand ligatures. Wise had been shot once in the chest from a few inches distance with a .25 caliber pistol. This wound perforated his spinal cord and was the cause of death. In addition, he had been shot in the left temple from a distance of no more than three inches. He had been further bludgeoned with a motel lamp, causing abrasions of the head and skull, broken teeth and multiple fractures of the right side of the jaw. Chips broken from the wooden lamp were removed from this victim's right temple and mouth.

Mark Concannon's body was found in the bathroom area of the room, head resting on a pillow. Like Wise, he had been shot in the left chest region at close range, and the chest wound similarly perforated his spinal cord. Like Wise, Concannon had been shot near the temple from no more than three inches distance. Unlike Wise, however, Concannon did not die instantaneously from these wounds. According to the medical examiner, this victim lived a short time after being shot. The examiner testified to three other findings concerning Concannon. He found hemorrhages at the base of Concannon's neck caused by bindings secured there. Second, he found evidence of "defensive wounds" in the form of black and blue marks over Concannon's knuckles of the sort sustained while trying to ward off blows. Finally, he had removed a pair of calf length men's dress stockings from the mouth of this victim, socks which had been pushed to the back of his throat, thereby obstructing his breathing passage.

The two victims had been bound and otherwise restrained with dozens of strips of bedding material, shoelaces and their own clothing before their executions. Their bodies were covered with blankets. Robert Wise's briefcase, containing his credit cards, was removed from the motel. Mark Concannon's borrowed Oldsmobile was taken from the motel parking lot.

At 8:40 p.m. on 25 January 1980, the defendant appeared at the Mesa home of Robert Wise. The defendant carried in one hand Wise's business card, and after falsely identifying himself, inquired whether "Bob" Wise was at home. After a brief conversation with the victim's wife, the defendant departed.

At about 5:20 p.m. on 26 January 1980, the defendant drove Concannon's borrowed Oldsmobile into a reserved parking lot on the campus of Northern Arizona University in Flagstaff, Arizona. The campus policeman monitoring use of the lot advised the defendant that it was a restricted lot and directed him to another location. During their conversation, the officer observed that the defendant was wearing two jackets, and that while he was driving a car bearing Ohio license plates, the defendant seemingly spoke with a southern accent. These circumstances aroused the officer's suspicion, and noting the license number of the vehicle, the officer called his police dispatcher and asked him to check the license number. As the defendant drove away from the encounter, the dispatcher reported that the car was stolen and was possibly involved in two homicides in Tucson. With the aid of two other officers, the Oldsmobile was stopped, and the defendant arrested and searched. The officer removed a .25 caliber automatic pistol from the pocket of one jacket worn by the defendant, and seized a black identification case containing one badge inscribed "Security Guard," another inscribed "Special Officer," a Texas driver's license and a partial (cut in half) Oklahoma driver's license, both issued to Ronald Gene Svetgoff. The first officer asked the defendant if he was Svetgoff, and he replied that he was, and explained the lack of resemblance to the license picture owing to changes in hairstyle and weight. The automobile was towed to stor-

age and the defendant held. Tucson authorities flew to Flagstaff where they inventoried the contents of the Oldsmobile and arranged for the defendant's return to Pima County.

The defendant was held in custody until his trial, which began 21 April 1982. During October of 1980, the defendant committed an assault on a fellow jail inmate, and was convicted on 30 July 1981 of Dangerous or Deadly Assault by Prisoner, a felony for which he was sentenced to life imprisonment without possibility of parole for twenty five years. See A.R.S. § 13-1206. As to the charges in the instant case, the defendant insisted on serving as his own counsel, and the trial court ordered a public defender to act as advisory counsel. Prior to the trial the defendant threatened specifically to harm his advisory counsel, and generally threatened the participants in the trial. As a result of these threats, the court ordered that the defendant be shackled with leg irons for the duration of the trial. The defendant at trial conducted no direct examination, asked only one question on cross examination, and made no jury arguments.

At the close of the evidence, over strenuous objection by the defendant, the court ordered advisory counsel to submit proposed jury instructions. The defendant discarded the copy of these instructions provided him by advisory counsel. The trial court considered the advisory counsel-submitted instructions, and on its own motion, with the defendant's assent, added an instruction on the defendant's right not to testify. The defendant was also given an additional day to submit instructions of his own design, but he failed to do so and his request for a further continuance for this purpose was denied. His convictions for first degree murder, A.R.S. § 13-1105, robbery, A.R.S. § 13-1904, kidnapping, A.R.S. § 13-1304, and theft, A.R.S. § 13-1802, followed.

At the defendant's sentencing hearing, the trial court invited him to present factors in mitigation, and offered to allow the defendant additional time to do so. The defendant declined, and the trial court thereafter found as aggravating circumstances that the defendant had a prior felony conviction for the deadly assault for which life imprisonment was impossible; that that same crime involved the use of violence; that the defendant committed the instant crimes for pecuniary gain; and that the instant murders were committed in an especially cruel, heinous or depraved manner. The trial court found no mitigating factors sufficient to overcome the aggravating factors and sentenced the defendant to death penalties for the murders of Wise and Concannon to be served consecutively one to the other, both to be served consecutively to the sentences imposed for the robberies and kidnappings and the theft of Concannon's borrowed vehicle.

PRETRIAL ISSUES

1.

The defendant first contends that he was denied effective assistance of counsel during the pretrial phase. First, defendant alleges that the quality of cross examination and arguments to the court made by the public defenders at the pretrial hearings fell below the standard of minimum competence which we adopted in *State v. Watson*, 134 Ariz. 1, 653 P.2d 351 (1982). Defendant alleges that the public defenders "did not vigorously respond to the state's arguments," and did not respond to several questions posed by the trial court.

[1] We have reviewed the pretrial record in an effort to ascertain whether the performance of the public defenders prior to the defendant's undertaking of his own defense fell below the *Watson* standard. We believe that their performance was sufficiently competent to reject the defendant's general contention of ineffective representation. We find no error.

[2] The defendant further contends, however, that the public defenders failed to file timely a notice of change of judge under Rule 10.2, Arizona Rules of Criminal Procedure, 17 A.R.S. The parties were noticed that this matter was permanently assigned to the trial judge on 8 February 1980. No motion for change of judge was

filed within the 10 day limit for filing a notice of change of judge under Rule 10.2. Later, on 11 March 1980, the public defenders filed a "Notice of Intention to File Motive Challenging Permanent Assignment of Superior Court Trial Judge." The basis of the motion was that the defendant was denied his sixth amendment right to an impartial judge because the trial judge assigned to the case had previously sentenced another defendant to death. The evidence indicates that while the judge had imposed the death penalty in one previous case, he had failed to sentence defendants to death in three other capital cases over which he presided. There was no other evidence that he was predisposed to giving the death penalty.

Admittedly, by failing to file a timely motion for change of judge, the defendant lost the right to peremptorily remove the judge pursuant to Rule 10.2, supra, and had to rely upon removal for cause pursuant to Rule 10.1. We do not believe, however, that this indicates counsel's performance fell below the minimum professional competence standard set down in Watson, supra, applicable to cases on appeal as of the date of the Watson decision, *State v. Nunez*, 125 Ariz. 257, 660 P.2d 858 (1980). There is no showing that a change of judge was critical in the first place, because the facts do not support a conclusion that the judge was biased. It was not prejudicial for the public defenders to miss the deadline for changing the judge under Rule 10.2, supra. Under the circumstances, defendant was not denied effective assistance of counsel.

2.

[3] The defendant's second contention is that his constitutional rights to compulsory attendance of witnesses and cross examination were violated when the trial court denied his motions to recuse the prosecutor, and to call him as a witness, because the prosecutor had been present at the time some of defendant's statements were taken. We do not agree.

Recently, in *State v. Jessen*, 134 Ariz. 458, 657 P.2d 871 (1982), the defendant sought to call the prosecutor as a witness to testify to the events surrounding the making of his inculpatory statements during his interrogation. The prosecutor avowed to the court that he was never alone with the defendant during the interrogation, and that two other witnesses, police officers present at the interrogations, were able to give accounts of the proceedings. We stated in *Jessen*, supra, that "[t]he testimony of the prosecutor would have been cumulative of the testimony of the officers. Defendant has shown no issues concerning the interrogation on which the prosecutor would have been the only person to offer evidence." *Id.* 134 Ariz. at 462, 657 P.2d at 875. We found no abuse of discretion in the trial court's denial of the defendant's motion to call the prosecutor as a witness. *Id.*

Our disposition of this issue in the instant case is the same. In the arguments on the motion to recuse the prosecutor, the prosecutor avowed that at no time in his contacts with the defendant was he unaccompanied by other police authorities, and the prosecutor's avowals to the court were corroborated by one of the detectives present at the encounters between the defendant and the prosecutor. We feel, as we stated in *Jessen*, supra, that the defendant did not show a need for calling the prosecutor as a witness at trial, and the prosecutor's recusal from the case was not required. In finding no error, however, we wish to reiterate what we have recently stated:

> We note the increasing number of cases before this court where the prosecutor is also a witness on some point in issue, usually the admissibility of a confession or statement made by the defendant. This we believe skirts the line not only of the Code of Professional Responsibility, DR5-102, Rule 29(a), Rules of the Supreme Court, 17A A.R.S., but can be a violation of due process. *See* Annotation, 54 A.L.R.3d 100. Where there is prejudice, we would be compelled to reverse on this point. Prosecuting attorneys in the future should avoid putting themselves in this position. *State v. Williams*, 136 Ariz. 52, 57, 664 P.2d 202, 207 (1983). *See also*

State v. Tuzon, 118 Ariz. 205, 575 P.2d 1251 (1978).

3.

The defendant's third assertion of pretrial error is that the trial judge did not conduct a proper hearing to determine his competency to waive counsel. We note that beginning in 1980, there were several motions for mental examination under Rule 11.2, Arizona Rules of Criminal Procedure, 17 A.R.S., and some were conducted though the defendant failed to cooperate at times.

[4] On 5 January 1981 the defendant signed a stipulation that his competency be determined on the basis of psychiatric reports filed with the court. On 7 January 1981, after reading the reports of both psychiatrists, the court entered a minute entry finding "that Defendant is able to understand the proceedings against him and assist counsel in his own defense." Because a defendant is competent to stand trial does not mean the defendant is competent to waive the assistance of counsel. *State v. Hartford*, 130 Ariz. 422, 424, 636 P.2d 1204, 1206 (1981); *see Westbrook v. Arizona*, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966). Therefore on 23 March 1982 the trial court conducted a hearing to determine whether the defendant should be allowed to represent himself on the murder charge. The court reviewed the facts dealing with the defendant's education and experiences in the justice system, including a previous waiver of counsel hearing on the prisoner assault charge, and incorporated those facts by reference before ruling that "the defendant [was] able to represent himself."

[5, 6] We believe the court did not abuse its discretion in determining that the defendant was mentally competent to waive counsel. The trial court in making its determination not only relied here on the psychiatrists' opinions, but it also observed the defendant's demeanor and heard his responses to inquiries about procedural matters posed by the court. The record reflects that the defendant was articulate, clearly and forcefully expressing his desire to represent himself. The defendant contends, however, that the trial court gave insufficient weight to the fact that he had years before been diagnosed to have organic brain syndrome. We have said that a mere diagnosis of a mental disease or disorder does not mean that the defendant is unable to make rational decisions regarding his case. *See State v. Evans*, 125 Ariz. 401, 402, 610 P.2d 35, 37 (1980); *State v. Thompson*, 113 Ariz. 1, 3, 545 P.2d 925, 927 (1976). We find no error.

4.

Defendant next claims that even if he was competent to waive counsel, the trial court failed to ascertain whether the defendant did, in fact, make a knowing and intelligent waiver of his right to counsel. The defendant's brief alleges that the trial court

> made no effort to warn the defendant of the potential pitfalls that face a lay person in representing himself. The Court did not question the defendant about educational background. The Court did not question how well versed the defendant was in legal procedures and the issues of the case. The Court did not advise him that professional assistance would be beneficial and advantageous to the defendant. The Court clearly failed to apprise the defendant of the dangers inherent in self-representation.

We do not agree.

[7] At the 15 April hearing, as well as the hearings of 15 and 23 March 1982, the defendant's educational level and his familiarity with the rules of procedure in criminal matters were established. At the later of the March hearings the trial court advised the defendant that his first degree murder charge "could result in the death sentence." He further told the defendant that "it is a terribly complex, terribly serious case." He then inquired of the defendant whether in such circumstances he was certain he wanted to represent himself, to which the defendant affirmatively replied. At the April hearing, the trial court advised

the defendant that the point of having advisory counsel at his table during the trial is that "he would be ready to go in case you decided that you are in too deep of water to continue."

In *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the United States Supreme Court stated that "waivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused'." *Id.*, 101 S.Ct. at 1883–84, quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461, 1466 (1938). And we have stated:

> The fundamental question then is not one of the wisdom of the defendant's judgment but whether the defendant's waiver of counsel was made in an intelligent, understanding and competent manner. * * * All factors relating to the determination of whether the defendant knew exactly what he was doing when he waived his right to counsel are relevant. *State v. Martin*, 102 Ariz. 142, 146, 426 P.2d 639, 643 (1967).

We believe that the record complies with the federal and state standards requiring a knowing and intelligent waiver of the right to counsel and assertion of his right to self-representation.

Defendant, however, contends that the failure to sign a written waiver negates the waiver of counsel. Our state constitution in section 24 of article 2, allows a defendant to waive counsel, and Rule 6.1(c) of our Rules of Criminal Procedure, 17 A.R.S., requires that "[a] defendant may waive his rights to counsel * * * in writing, after the court has ascertained that he knowingly, intelligently and voluntarily desires to forego them." At the end of the 15 April argument on representation, the trial court allowed the defendant to represent himself notwithstanding his refusal to sign a waiver, but ordered Mr. Cooper to serve as advisory counsel.

[8] We have stated that the absence of a written waiver does not constitute reversible error. *State v. Evans*, supra, 125 Ariz. at 402, 610 P.2d at 37. Under the facts and circumstances of this case as indicated by the hearings, it is clear that the defendant was advised of the charges and possible death penalty and that he was reminded of the complexity of the proceedings and the advantage of advisory counsel. Despite these warnings, defendant waived counsel. We find that the defendant did voluntarily waive counsel, and that such waiver was knowingly and intelligently made. We find no error.

5.

The defendant's two final pretrial issues both deal with motions to suppress that were denied by the trial court. He first argues that the trial court erred in denying his pretrial motion to suppress physical evidence discovered upon his arrest on the Northern Arizona University campus. The ground for this contention is that the policeman had no right to run a computer records check on the license plate of the automobile the defendant was driving on the campus, and that the resulting arrest violated his fourth amendment right to be free of unreasonable searches and seizures.

[9, 10] The defendant cites no authority for the proposition that a policeman may not conduct a check on a license plate at will even without reasonable suspicion, and we have found none. We believe that there is no expectation of privacy in the license plate affixed to the exterior of one's motor vehicle driven in public meriting constitutional protection. Also, there was no search or seizure of the vehicle at the time the license check was made. Neither was there a detention of the defendant. By the time the defendant was stopped by the police for the purpose of effecting his arrest, the officers knew that the vehicle had been reported to be stolen and possibly involved in a double homicide. At this juncture, the police had probable cause to arrest the driver. We find no error.

6.

The second of the alleged trial court errors on pretrial suppression motion rulings concerns two statements made by the defendant to a Tucson detective which the detective later related at trial. The first occurred at the Flagstaff airport when the authorities were transporting the defendant to Pima County. In response to an officer's attempt to shield the defendant from the January airport winds by sharing his jacket, the defendant replied "You don't need to do that, I deserve whatever I get." The second statement occurred during a conversation at the jail between the defendant and the detective concerning the clothing seized from the defendant upon his arrest. The detective advised the defendant that the clothes were being held in evidence, and the defendant said that something usable might be found on the burgundy shirt and shoes that he had been wearing, but that the other clothing had not been worn. The defendant now claims that these statements were taken in violation of his *Miranda* rights, and that their admission in evidence violated his fifth amendment privilege against self-incrimination. The basis of this claim is that when the Tucson authorities approached the defendant being held in Flagstaff and read him his *Miranda* warnings, he invoked his right to silence, so that anything said by him thereafter was inadmissible under *Miranda*. We do not agree.

[11, 12] The warnings were read at 9:30 a.m. on 27 January in Flagstaff, at which time the defendant stated that he had nothing to say. He was then arraigned. The Tucson authorities departed with the defendant about 2:00 p.m. that day. The statement the defendant made at the airport about his "deserving" his fate was not in response to any questions or prompting by the authorities. It was merely a response to the shielding gesture by the detective. As to the conversation at the Pima County Jail, it began when the defendant asked if he could have some of his clothing returned to him. When the detective replied that it had to be retained as evidence, the defendant indicated that only the shirt and shoes would have probative value. Again, this statement was not in response to any interrogation of the defendant by the detective, or attempt by the police not to scrupulously honor the defendant's right to remain silent. *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *See Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). It was made as a result of a conversation initiated by the defendant, and is admissible in evidence at trial against him. *State v. Landrum*, 112 Ariz. 555, 559, 544 P.2d 664, 668 (1976). We find no error in the denial of the two motions to suppress.

TRIAL ISSUES

7.

The defendant's first assignment of error relating to the conduct of his trial is that his constitutional rights to self-representation and a fair trial were violated by the court's order that he be shackled during the trial. The defendant complains that his right to self-representation was impaired by not being able to move about the courtroom like the prosecutor at trial. He further asserts that the trial court abused its discretion in ordering the ankle shackling because there was no justification for the restraint.

[13, 14] Although we have stated that "[w]e do not view with favor the shackling of a defendant except for the most compelling of reasons," *State v. Watson*, 114 Ariz. 1, 12, 559 P.2d 121, 132 (1976), cert. denied 430 U.S. 986, 97 S.Ct. 1687, 52 L.Ed.2d 382 (1977), it is still within the sound discretion of the trial court whether to have a prisoner shackled at trial. *State v. Starks*, 122 Ariz. 531, 534, 596 P.2d 296, 369 (1979); *State v. Watson*, supra, 114 Ariz. at 11, 559 P.2d at 131. In the instant case, the defendant threatened bodily harm to his appointed advisory counsel and to any other attorney who might subsequently act in that capacity. The court was aware of that threat and the fact that the defendant was disposed to violence, because he was apprised of recent episodes of assaultive behavior by the defendant while in custody. The court noted

the factors upon which he based his decision on the record in compliance with the rule of *State v. Reid*, 114 Ariz. 16, 22, 559 P.2d 136, 142 (1976), cert. denied 431 U.S. 921, 97 S.Ct. 2191, 53 L.Ed.2d 234 (1977). We cannot say, on reviewing the record, that the trial court abused its discretion in exercising its responsibility in overseeing the security of the courtroom and of the officers of the court.

[15] Nor do we believe that a defendant, because he is representing himself, has some constitutional right, attendant upon his right to self-representation, to walk about the courtroom during the trial. Since the defendant here was fully able to address the judge and jury and to conduct witness examinations from the defense table, we find no substantive encroachment upon his right to self-representation, even though his immobility might have been inconvenient. We find no error.

II.

The second trial error alleged by the defendant is that the court improperly admitted testimony of Ronald Svetgoff, a robbery victim of the defendant prior to the instant crimes, and Jeri Wise, the widow of one of the victims. The defendant contends that introduction of their testimony, dealing with contacts each had with the defendant, improperly brought before the jury evidence of other bad acts. Such evidence, argues the defendant, was inadmissible under Rule 404(b) of our Rules of Evidence, 17A A.R.S., which states:

> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The state contends that Svetgoff's testimony was properly introduced to establish identity, intent, and common scheme or plan. We agree.

We have discussed the "modus operandi exception" to Rule 404(b) in these terms:

> The modus operandi exception to the rule that evidence of other bad acts is inadmissible has two aspects. A separate act with a similar modus operandi may indicate that the defendant, in the act for which he is on trial, was carrying out a common plan or scheme. (citations omitted) An unrelated bad act with a similar modus operandi may also be admissible to identify the defendant as the one who committed the crime for which he is being tried. (citation omitted)
>
> When utilizing the common scheme exception, the basic test for admissibility is that "[s]imilarities between the offenses * * * must be in those important aspects where normally there could be expected to be found differences." (citation omitted) Logically, this test should also apply to the admission of evidence under the identity exception. Moreover, in determining admissibility, a court must also consider differences between the acts as well as similarities. *State v. Jackson*, 124 Ariz. 202, 204, 603 P.2d 94, 96 (1979).

[16] The Svetgoff testimony tends to establish the identity of the murderer of Wise and Concannon through the similarity of the acts in each incident involving armed robbery of motel guests, both as to the manner of securing the victims and as to the items taken by the perpetrator. Svetgoff testified that he was made to lie down on the floor while his hands were secured with a tie behind his back. His legs were then tied together with a dress shirt. Next his legs and hands were tied together with a jump rope. A sock was stuffed into his mouth and then an undershirt was banded across his mouth and held in place by a belt. This method of hog-tying and gagging the victim with his own clothing was repeated in the binding of the instant victims and the gagging of Concannon with socks.

Svetgoff also testified that he was dragged into the bathroom area of the motel room, and that the defendant placed a pillow under his head while Svetgoff was lying on the floor. Concannon was found,

bound and gagged, on the floor of the bath area of the motel room, head lying on a pillow placed there by his murderer. Finally, Svetgoff testified that his clothes, briefcase and automobile were stolen by the defendant. Robert Wise's clothes and briefcase were stolen by his murderer, and Mark Concannon's automobile was stolen in the same incident.

Admittedly, there are differences between the Svetgoff and Wise-Concannon episodes, the most obvious of which is the disposition of the respective victims. But in the "important aspects where normally there could be expected to be found differences" between the offenses, *Jackson, supra*, the similarities of choice of victims (salesmen motel guests), peculiar method of eliminating resistance (hog-tying with clothing and gagging using socks), placement of victims (in bathroom with heads on pillows), items stolen (briefcases and clothing) and manner of departing the crime scene (via the victim's automobile) are so striking that we conclude that Svetgoff's testimony tends to prove the identity of the killer of the instant victims.

Furthermore, the Svetgoff testimony is probative under the common scheme exception to Rule 404(b). There was trial testimony of no evidence of forcible entry into the motel room where the instant victims were found. Svetgoff testified that he was tricked into letting the defendant into his motel room by the defendant's presentation of false "security guard" badges. The N.A.U. policemen who apprehended the defendant found false security guard badges, along with a driver's license belonging to Svetgoff. Svetgoff's testimony, when coupled with that of the arresting officer and of the La Quinta investigating detective, strongly suggests identity and common scheme or plan. Svetgoff's testimony was relevant and probative.

[17] The testimony of Mrs. Wise about the visit to her home on the evening of the murders by a man she positively identified as the defendant before testifying tends to prove the identity of the murderer. The defendant appeared at her door holding one of her husband's business cards and asking for "Bob" Wise, according to her testimony. Since the defendant was discovered in possession of Wise's briefcase and other personalty at the time of his apprehension in Concannon's car by Flagstaff police, a jury could legitimately infer that he obtained the business card and Wise's home address as a result of the murder and robbery. Mrs. Wise's testimony was also relevant and probative.

The relevance and probative value of each witness' testimony being established, we must evaluate the prejudicial effect of the testimony on the jury. Rule 403 of our Rules of Evidence states:

> Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

We readily concede that the Svetgoff testimony concerning his victimization by the defendant tends to create an impression of the defendant as a bad man. Nonetheless, we do not believe that the prejudicial effect substantially outweighs the probative value on the identity issue addressed by Svetgoff's testimony.

With regard to Mrs. Wise's testimony, assessing its prejudicial effect is problematical. The defendant was in contact with the victim's wife for but a few moments, made only harmless inquiries, and departed without incident. We can only speculate as to the defendant's motivation for the visit. However, what appeared to be a seemingly innocuous visit was of great probative value on the issue of identity when considered along with the rest of the evidence. We find no error.

9.

[18-20] The defendant's next assertion of trial error concerns the admission of evidence gathered as a result of the search

under warrant of the stolen car that defendant was driving when he was apprehended. He contends that the warrant was invalid for lack of jurisdiction, and that the subsequent search violated his fourth amendment protection against unreasonable searches. This contention overlooks the basic premise that one must have a legitimate expectation of privacy in the thing searched in order to have standing to object to the validity of the search. A thief of property has no legitimate expectation of privacy in stolen goods. And "this court has refused to recognize as 'reasonable' any expectation of privacy a thief may have in an automobile which he has stolen." *State v. Schad*, 129 Ariz. 557, 563, 633 P.2d 366, 372 (1981), cert. denied 455 U.S. 993, 102 S.Ct. 1492, 71 L.Ed.2d 688 (1982), citing *State v. Myers*, 117 Ariz. 79, 570 P.2d 1252 (1977), cert. denied 435 U.S. 928, 98 S.Ct. 1498, 55 L.Ed.2d 524 (1978). We find no error.

10.

[21, 22] On 20 April 1982 the court held a pre-trial hearing which occurred five days after the trial court granted the defendant's request to represent himself. The defendant, after first objecting to the admission of the photographs in evidence, stated, "I would like to move to admit them all so we can proceed. * * * I withdraw my objection."

On appeal the defendant claims that certain photographs of the victims had no probative value, were highly prejudicial, and were therefore erroneously admitted into evidence under Rule 403, supra. Ninety-three large, 8 × 10" color photographs were introduced in evidence at the trial. We have no hesitancy in stating that had the defendant maintained a valid objection, we would consider reversing the conviction, because the prejudice of several gruesome photographs among the over 90 admitted outweighed their probative value. We believe that counsel, by "overtrying" his case, could well have placed the conviction in jeopardy. The defendant, however, withdrew his objection to their admission.

Generally, without objection to the admission of gruesome photographs at trial, the issue may not be raised on appeal. *See People v. Hines*, 61 Cal.2d 164, 37 Cal.Rptr. 622, 390 P.2d 398 (1964); *State v. Phipps*, 224 Kan. 158, 578 P.2d 709 (1978); *State v. Powers*, 645 P.2d 1357 (Mont.1982). Because the waiver of objection at trial made by the defendant is valid, he may not raise the issue on appeal.

11.

When it came time to settle instructions, the court advised the defendant that the arguing of instructions was "a highly technical matter." Although defendant indicated a desire to handle the matter personally, stating, "I won't accept any instructions from [advisory counsel] because I am representing myself," the court ordered advisory counsel to provide the defendant with instructions, adding "What you do with them is your business." The trial court also ordered that advisory counsel participate in the settling of instructions, "because I do believe that is a matter that perhaps * * * you [the defendant] don't have the competence to handle."

On 26 April 1982, the defendant tore up the copy of instructions provided by advisory counsel and discarded them in a wastepaper basket. The defendant also informed advisory counsel that he did not want him arguing on his behalf during the settling of instructions, and during the settling of the instructions, the defendant objected to every instruction that was proposed by the state and the defense and to several that the court stated its intention to give. In addition, the defendant advised the court that he did not submit any of his own instructions because the court ordered his advisory counsel to do so, and that he would have prepared them absent the court's order. After instructions were approved by the court, the defendant was given until the following morning to prepare his own instructions, which the defendant did not do because of a claimed lack of access to the rules of procedure governing instructions. Defendant requested additional time to prepare instructions while renewing his objec-

tion to the submission of advisory counsel's instructions in his behalf. The court denied the request for additional time, and asked the defendant if he would like an instruction given regarding the defendant's prerogative not to testify. The defendant said he had no objection to the giving of such an instruction.

[23] The court used some of defense counsel's proposals in instructing the jury, as well as the state's, and the judge added some of his own. The defendant now argues that the preparation and giving of these instructions over his objection violated his state and federal constitutional rights to self-representation, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). We do not agree.

Instructions of the court are just that, instructions of the court, and not the instructions of the parties. True, the parties have a right to be heard concerning the instructions to be given, to voice objections thereto, and to propose instructions to the court. The defendant was given an opportunity to do this in the instant case. But the instructions in the final analysis are the court's, and the court may look to any source for help and assistance in preparing these instructions. Defendant's right of self-representation does not give him the power to exclude his advisory counsel from participating in the settling of instructions.

DEATH PENALTY STATUTE ISSUES

The defendant raises four attacks on our death penalty statute's constitutionality.

12

The first is that applying A.R.S. § 13–703 (Arizona's death sentence statute) violates the prohibition against cruel and unusual punishment embodied in the eighth amendment and Ariz. Const. art. 2 § 15. The defendant cites two reasons for this conclusion, the first being that the sentencing scheme invites arbitrary and capricious application of the death penalty. In support of this contention the defendant asserts that there is no stated burden of proof for a defendant's establishment of mitigating factors, and that the notion of mitigation "sufficiently substantial to call for leniency" leaves too much to the discretion of the sentencing judge.

[24] The defendant's arguments here are a variation on the theme that A.R.S. § 13–703 fails to provide adequate standards to guide sentencing discretion. We have previously stated that the purpose of an aggravation/mitigation hearing is to tailor the penalty to the offender as well as the crime, and that the Arizona capital sentencing plan aims both at flexibility to permit individualized decisionmaking and at prevention of arbitrariness by creating standards to guide the sentencer. *See State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13, cert. denied — U.S. —, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). We have described the formula of "sufficiently substantial to call for leniency" as involving the weighing of aggravating against mitigating circumstances on the basis of the gravity of each circumstance. *See id.* And we have grounded our independent review of whether a defendant has established a mitigating circumstance on a preponderance of the evidence standard. We believe that under these conditions we have eliminated the risk of capriciousness to the extent necessary to defeat any claim that the application of our death penalty statute constitutes cruel and unusual punishment, or in some manner violates due process.

[25] Defendant further contends that the sentencing scheme must be unconstitutional because the prosecutor has unbridled authority in his decision whether to seek the death penalty. This contention has been previously addressed by the United States Supreme Court, which stated that pre-sentencing decisions by actors in the criminal justice system that may remove an accused from consideration for the death penalty are not unconstitutional. *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859, 889 (1976). We find no merit in the defendant's eighth amendment claims.

13.

[26] The next attack on the death penalty statute advanced by the defendant is that its failure to involve a jury in the capital sentencing decision violates his sixth amendment rights. This argument has been rejected by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913, 922–23 (1976), and has likewise been rejected by this court on numerous occasions. *State v. Richmond*, 137 Ariz. 312, 316, 666 P.2d 57, 61 (1983); *State v. Gretzler*, supra, 135 Ariz. at 56, 659 P.2d at 15 (citing cases).

14.

[27] The third attack on A.R.S. § 13–703 is that the statute violates due process because the legislature placed the burden of proof of mitigating circumstances on the defendant. Richmond, supra, is dispositive of this claim: "[o]nce the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances." *State v. Richmond*, supra, 137 Ariz. at 316, 666 P.2d at 61. *Accord, State v. Smith*, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980); *State v. Watson*, 120 Ariz. 441, 447, 586 P.2d 1253, 1259, cert. denied 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979).

15.

[28] The defendant's final attack on the constitutionality of the statute is that it is impermissibly void for vagueness. This argument is directed toward the aggravating circumstance concerning murders committed in "an especially heinous, cruel or depraved manner." A.R.S. § 13–703(F)(6). The defendant claims that it is impossible to make a finding of this circumstance with uniformity because our definitions of terms in the quoted phrase defy standardization. We disagree; as we stated in *State v. Jeffers*:

> Each element—cruel, heinous and depraved—has been narrowly defined and construed.
>
> . . . . . .
>
> We have been insistent that the murder be *especially* cruel or *especially* depraved before this section would apply. We have clearly defined the terms and have delineated factors to guide us in determining if the crime was indeed committed in such a manner. *State v. Gretzler*, supra. *State v. Jeffers*, 135 Ariz. 404, 430, 661 P.2d 1105, 1131 (1983) (emphasis in original)

The best empirical evidence refuting the charge of impossibility of standardizing the "cruel, heinous or depraved" circumstance is our recent decision in *State v. Richmond*, supra. Though this court affirmed the defendant's conviction and sentence in that opinion, three members of the court voted against the author's finding that the crime was especially heinous and depraved. *Id.*, 135 Ariz. at 421, 422, 661 P.2d at 1122, 1124 (concurring opinion of Cameron, J., and Gordon, V.C.J.; dissenting opinion of Feldman, J.). The disagreement as to the existence of this circumstance focused on whether the record supported a finding of infliction of gratuitous violence upon, and needless mutilation of, the victim. The lengths to which this court has gone in order to insure the proper application of the definitions of terms like "cruel" and "depraved" reflect a commitment to uniformity in imposition of this most serious sanction. We believe that such efforts give sufficient guidance to sentencing courts, and that the legislatively propounded criteria for the aggravating circumstances are accordingly not impermissibly overbroad or vague.

INDEPENDENT REVIEW OF SENTENCE

[29, 30] We review each death penalty imposed by our state's sentencing courts to insure that the sentence has not been applied in an arbitrary or capricious manner. We independently review the record of each capital case to determine the correctness of the findings of the trial court as to aggravating and mitigating circumstances, in order to independently determine the propriety of the sentence imposed. *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27 (1983);

State v. Gretzler, supra, 135 Ariz. at 57, 659 P.2d at 16.

[31] In the instant case, the defendant was sentenced to life imprisonment, on 30 July 1981, for his conviction of dangerous or deadly assault by prisoner, A.R.S. § 13-1206. *State v. Harding*, Cause No. CR-04694, aff'd No. 5417, filed 29 April 1982. This felony involves commission of an assault "using or exhibiting a deadly weapon or dangerous instrument," or the knowing or intentional infliction of "serious physical injury" on the assaulted party. A.R.S. § 13-1206. The facts of the prior conviction indicate the defendant and another jail inmate struck a fellow inmate several times with darts discharged through a homemade blowgun. One dart penetrated the victim's jawbone, a second traversed his skin near the shoulder, and a third penetrated his leg. A nurse and a forensic pathologist both testified at the trial of this matter that the darts were capable of causing serious physical injury.

On these facts we find that this earlier conviction supports the finding of two aggravating circumstances: A.R.S. § 13-703(F)(1) conviction of an offense punishable in Arizona by life imprisonment; and (F)(2), conviction of a felony involving the use of violence on another person.

[32] As to the finding that the murder was committed for pecuniary gain, the record indicates that the defendant removed clothing, a briefcase and credit cards from the possession of Robert Wise. He left the scene of the homicides in a car that had been in the custody of Martin Concannon. The instant sequence of binding, robbing and leaving helpless the victims while stealing their auto, like defendant's earlier conduct in the Svetgoff robbery, supports a finding that the defendant committed the murders in the course of obtaining valuable personal property from his victims. We therefore find that the aggravating circumstance of A.R.S. § 13-703(F)(5) exists in the instant action.

[33] The trial court additionally found as an aggravating circumstance that the murders were committed in "an especially cruel, heinous and depraved manner." *See* A.R.S. § 13-703(F)(6). The court did not state on the record what aspects of the crimes it found to be cruel, heinous or depraved. The medical examiner testified that some of the bindings restraining the victims were secured so tightly that they caused abrasions and black and blue discoloration of the skin resulting from hemorrhaging of tiny capillaries beneath the skin's surface. Likewise, bludgeoning of the bodies caused abrasion, discoloration and hemorrhaging. The doctor testified, however, that such physical manifestations of blunt trauma are consistent with injuries inflicted prior to, contemporaneously with, or shortly after the time of death. He did not speculate whether the beatings of the victims occurred before or after their deaths. He stated only that Martin Concannon lived between 3 and 20 minutes after being shot, but it is not known whether he was conscious at the time. The investigating officers testified to the facts of Wise's tethering by the neck to the bedpost and of Concannon's gagging with socks, which the doctor testified obstructed his breathing passages.

[34] The state must prove this aggravating circumstance, like the others, beyond a reasonable doubt. *State v. Jordan*, 126 Ariz. 283, 286, 614 P.2d 825, 828, cert. denied 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980). Because there is no evidence beyond a reasonable doubt that the victims were conscious, the state's evidence fails to establish that this sadistic treatment was especially cruel to the victims. *See State v. Gretzler*, supra, 135 Ariz. at 51, 659 P.2d at 10.

[35] The finding of depravity, however, is sustainable. The photographs of the autopsy of Robert Wise make a strong case for this finding. The right side of Wise's face, from the area between the temple and the jaw line, was severely bruised and abraded. His right ear lobe was nearly severed, and his jaw was so broken as to have chipped off bone fragments and to have displaced the jaw from the normal

mandibular joint position. The nature and location of the damage sustained required a number of blows to the victim's face while the victim was stationary. The beating must have been administered while the victim was restrained, unconscious or deceased. The helplessness of the victim plus the gratuitous nature of the bludgeoning, beyond the point necessary to rob or to dispatch the victims by shooting, renders the beating apart from the usual or the norm, and it is therefore depraved. *Cf. State v. Ceja*, 115 Ariz. 413, 417, 565 P.2d 1274, 1278, cert. denied 434 U.S. 975, 98 S.Ct. 533, 54 L.Ed.2d 467 (1977) (barrage of violence found depraved); *State v. Worsteck*, 134 Ariz. 452, 457, 657 P.2d 865, 870 (1982). Even if the beating with the lamp base occurred after the victim's decease, we still find this to be an act of gratuitous violence and a debasement of a corpse bordering on "needless mutilation of the victim." *State v. Gretzler*, supra, 135 Ariz. at 52, 659 P.2d at 11. *Cf. State v. Jeffers*, supra, 135 Ariz. at 430, 661 P.2d at 1131 (post-mortem beating of victim resulting in additional wounds and bleeding found especially heinous and depraved). The savage beating of Robert Wise, regardless of its timing, reflects a depraved mental state. The same is true of the treatment given Concannon, who was perversely gagged.

[36] The defendant chose not to present any evidence in mitigation, despite the trial court's urging. The burden of proof on mitigation is the defendant's. A.R.S. § 13-703(C). Since the defendant did not put on evidence of mitigating circumstances, the trial court found none. We do not, on review of the record before us, find conclusive evidence tending to show mitigation of the instant sentences.[1] We therefore independently find that there are no mitigating circumstances sufficiently substantial to call for leniency. The aggravating circumstances justify the imposition of the death penalty. *See* A.R.S. § 13-703(E).

1. In reviewing the presentence report, we take note of the following facts: the defendant was shuffled back and forth among family members at an early age; he first became institutionalized at the age of 10 for recurrent truancy; and he was diagnosed at about the age of 14 to have minimal brain damage and petit mal seizures, while his intelligence registered in the dull normal range. Despite these last factors, repeated psychological evaluations revealed no distortions in the defendant's thinking processes and a consistent diagnosis of no psychotic manifestations. His last psychological evaluation prior to his arrest on the instant charges resulted in a diagnosis of severe antisocial personality without psychosis.

PROPORTIONALITY REVIEW

[37] This court conducts a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), cert. denied 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977). This procedure has been endorsed by our federal circuit in *Harris v. Pulley*, 692 F.2d 1189, 1196 (9th Cir.1982), cert. granted sub nom. *Pulley v. Harris*, — U.S. —, 103 S.Ct. 1425, 75 L.Ed.2d 787 (1983).

[38] We have considered other cases in which a defendant with a serious criminal history murdered his victims for gain and in an especially cruel, heinous or depraved manner. *See State v. Gretzler*, supra; *State v. Raymond Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied — U.S. —, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982); *State v. Ricky Tison*, 129 Ariz. 526, 633 P.2d 335 (1981), cert. denied — U.S. —, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982); *State v. Gerlaugh*, 135 Ariz. 89, 659 P.2d 642 (1983), supplementing 134 Ariz. 164, 654 P.2d 800 (1982). In the first of these comparison cases, the defendant claimed partial impairment of his capacity to appreciate the wrongfulness of his conduct. The defendants in the last three cases claimed youth as a mitigating circumstance. In the instant case, the defendant was in his thirties at the time of the murders, and put on no evidence of mental impairment. Each of the defendants in the comparison cases received the death penalty and we affirmed their sentences. We find that the affirmance of the sentence here is not disproper-

tionate. We have searched the record for fundamental error, A.R.S. § 13-4035, and find none.

The convictions and sentences are affirmed.

HOLOHAN, C.J., and HAYS, J., concur.

GORDON, Vice Chief Justice (specially concurring):

Although I would affirm both the convictions and the sentences, I write to discuss the circumstances under which the aggravating factor of "committing [an] offense * * * in the expectation of the receipt of anything of pecuniary value" A.R.S. § 13-703(F)(5) should apply. In *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), I specially concurred stating that former A.R.S. § 13-454(E)(4) and (5) read together, indicated that the Arizona Legislature intended that these aggravating factors only apply in situations where the defendant is the procurer of the killer or the actual killer in a murder for hire agreement. These sections, which have since been renumbered but are substantively identical, are now codified at A.R.S. § 13-703(F) and read as follows:

"* * * *

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

* * * *"

The majority opinion in *Clark* stated that A.R.S. § 13-703(F)(5) is present "if the receipt of money is established as a cause of the murder." 126 Ariz. at 436, 616 P.2d at 896. In other words, the murder must have been committed with a "financial motivation." *Id.* Since *Clark*, this Court has consistently applied A.R.S. § 13-703(F)(5) in accordance with the majority opinion. The State Legislature has met in several regular and special sessions over a period of three years since the *Clark* decision, and although there have been two amendments to unrelated portions of A.R.S. § 13-703, to date there have been no changes to the portions of the statute which were the subject of my special concurrence in *Clark*. It is a generally accepted principle that our elected representatives know the law and thus should be aware of judicial interpretations of statutes. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982). I must therefore conclude that the lack of legislative action on those sections of A.R.S. § 13-703 that deal with pecuniary gain suggests that the Legislature has ratified the majority's decision in *Clark*. *Herman & MacLean v. Huddleston*, ___ U.S. ___, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) (in examining the cumulative application of Section 10(b) of the Securities Exchange Act of 1934, the Court stated that Congress' failure to address the cumulative nature of the Act, while making other substantial changes to the Act, suggests that Congress ratified judicial decisions applying Section 10(b) cumulatively). Thus, A.R.S. § 13-703(F)(4) and (5) apply not only to hired killer situations, but also to those cases in which the murder was committed with a "financial motivation." *State v. Adamson*, 136 Ariz. 250, 665 P.2d 972 (1983); *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983); *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982).

The language in A.R.S. § 13-703(F)(5) makes clear, however, that this aggravating circumstance does not apply in every situation where an individual has been killed while at the same time the defendant has made a financial gain. It is limited to those situations where "the defendant committed the offense * * * *in the expectation of the receipt* of anything of pecuniary value." A.R.S. § 13-703(F)(5) (emphasis added). In other words, the hope of pecuniary gain must provide the impetus for the murder. For example, if a beneficiary killed an insured in order to gain the proceeds of a life insurance policy this aggravating circumstance would be satisfied. On the other hand, an unexpected or accidental death that was not in furtherance of the defendant's goal of pecuniary gain, which occurs

during the course of or flight from a robbery, does not in itself provide a sufficient basis for finding the same aggravating circumstance. The aggravating circumstance in paragraph 5 should be found only in those cases where the murder is part of the defendant's overall goal of pecuniary gain, and not merely when a death occurs during which time the defendant benefitted financially.

FELDMAN, Justice, specially concurring.

I, too, would affirm both the convictions and the sentences. I write because, given the wording of the statute, I agree with Justice Gordon that A.R.S. § 13-703(F)(5) is applicable only where there is a causal relationship to the extent that the expectation of pecuniary gain provides "the impetus for the murder."

EXHIBIT B

Reporter's Transcript of Proceedings, April 23, 1982, filed July 29, 1982, page 177:

"MR. HARDING: Your Honor, if you decided I was competent to handle my defense in this trial and if in the instructions you no longer say I am competent --

THE COURT: Well, you will be arguing fine points of law.

MR. HARDING: Your Honor, may I ask you this: Is the trial any less essential than instructions?

THE COURT: Oh, no.

MR. HARDING: Then why are we concerned at this point?

THE COURT: Well, that's my order."

EXHIBIT C

Reporter's Transcript of Proceedings, April 23, 1982, filed July 29, 1982

"THE COURT: He has just --

MR. HARDING: I withdraw my objection.

THE COURT: He has moved to admit them all.

MR. WILD: Your Honor, I am not going to accept the offer of stipulation.

THE COURT: I think I had better go through these things myself.

MR. WILD: State's 25 is a photograph of the lamp that was used and shows blood on the base of it, blood which has been tested for -- in the crime lab and shown to be blood ...

THE COURT: All right. Just for clarity, the Court has indicated which photographs it finds to be probative or relevant or both. The Court has not admitted those into evidence and the admission in evidence will depend upon a proper foundation being laid for the photographs.

MR. WILD: Does the Court find that the probative value does outweigh the prejudicial value?

THE COURT: Yeah, the probative value out weighs the -- shall we say the rather gruesome nature of some of the photographs.

MR. WILD: And the prejudicial impact?

THE COURT: And any prejudicial impact that the nature of the photographs may arouse the emotions of the jury.

MR. COOPER: Judge, I would like to simply note for the record my objection that I raised las week, and we renew it and add to it that the sheer volume in number of photographs is also an outrage and will upset the jury and will ensure Mr. Harding does not receive a fair trial."

EXHIBIT D

Reporter's Transcript of Proceedings, April 23, 1982, filed July 29, 1982

"MR. HARDING: Your Honor, I would like to go on the record again as objecting to having to wear shackles during the trial and jury selection.

THE COURT: All right, I again deny the request to have the shackles removed. The history of the defendant indicates to the Court that he could be of some danger, if not shackled, in the courtroom.

MR. HARDING: May I respond to that by saying, Your Honor, I have not demonstrated any danger to anyone since the beginning of this proceeding or any undesirable behavior other than maybe responding to derrogatory statements made by the prosecution.

THE COURT: Well, I will say for the record you have behaved yourself very well, Mr. Harding, since you have been in the courtroom, each time you have been in the courtroom. But I do read accounts in the newspaper of activities in the jail and things of that nature and I am still going to stick by my ruling.

MR. HARDING: Thank you.

THE COURT: The record ought to also show that the counsel table which behind Mr. Harding is seated is solid in front so that the shackles on his feet will not be apparent to anyone sitting in the jury box.

MR. HARDING: Your Honor, I will be able to -- I won't be able to approach, say the jury or go through any of the melodramatics that the prosecutor will be able to go through. I won't get to dance and spin or any of those things with shackles on my feet.

THE COURT: I don't know how much the prosecutor is going to do.

MR. HARDING: I am sure he will do quite a bit.

MR. WILD: Judge, I don't dance well. Even my wife has

told me that.

MR. HARDING: He does a lot of dancing.

Another thing, Your Honor, I don't know if I have clarified it or not, but I am not going to question the jury.

THE COURT: You are entitled to.

MR. HARDING: I know.

THE COURT: You do what you want to do but ---

ORIGINAL

NO. 83-5912

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

DONALD EUGENE HARDING,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

As far as it goes, Harding's statement of the case is correct. However, he confines himself to merely reciting the fact that he was charged, convicted, and received various sentences, including two death penalties. The Court will want to be aware of the following facts proved by the state at trial: (1) When arrested in Flagstaff, Harding was driving the car loaned to one of the victims, Martin Concannon; (2) he had the second victim's (Robert Wise) credit cards and attache case; (3) he had the murder weapon in his pocket; (4) he left fourteen fingerprints on eight objects in the motel room where he hogtied, gagged, and shot both victims in the chest and head; (5) he had the phony "security guard" badge he used to dupe another motel guest in Waco, Texas, a month before he killed Wise and Concannon; the Waco robbery victim identified Harding as the man who used a "security guard" ruse to gain access to that victim's motel room; (6) Mrs. Wise, wife of one of the victims, identified Harding as the man who rang her doorbell in Mesa, several hours after killing her husband in Tucson, and asked if "Bob" was home; (7) Harding volunteered a statement to a Tucson detective to the effect that police might find blood on the shirt and shoes he had been wearing (they did); (8) while being transported from Flagstaff to Tucson in January 1980, Harding spontaneously told a detective that he deserved whatever happened to him. It is within the preceding factual context that the Court should consider whether Harding demonstrates any error of constitutional magnitude, and, if so, whether such alleged error was harmless beyond a reasonable doubt. United States v. Hasting, ____U.S.____, 103 S.Ct. 1974, 1981, 76 L.Ed.2d 96 (1983).

A.

ALLEGED VIOLATION OF RIGHT TO SELF-REPRESENTATION.

Indulging in a spurious analogy, Harding alleges that he was denied a fair trial because his advisory counsel, at the request of the trial court, prepared proposed jury instructions contrary to Harding's wishes. That, he asserts, contravened Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and mandates reversal of his convictions. Faretta was primarily concerned with the total denial of a defendant's right to represent himself, and did not attempt to flesh out in detail any concomitant problems that might arise when a court grants a defendant that right, but encounters specific problems attendant upon the exercise of the right during trial. While it may be true that the complete denial of self-representation may always be reversible error, Faretta surely does not stand for the proposition that, where one has had the opportunity to exercise that right, as in this case, any peripheral alleged infringement of the right must inevitably lead to reversal.

Harding's contention fails to consider two things: (1) context of the alleged violation; (2) applicability of the harmless error rule. In this case, Harding did exactly as he pleased during the entire trial with respect to how he wished to conduct the case. Advisory counsel did not open his mouth unless Harding wished him to do so. Near the end of trial, the trial court, in chambers, asked advisory counsel to prepare jury instructions. The trial court told Harding he could do with those as he wished. Harding tore them up, saying that he would have prepared his own if the court had not told advisory counsel to prepare them. The trial court gave him a day to do that, and he appeared the next morning with no instructions.

State v. Harding, ____Ariz.____, 670 P.2d 383, 396-97 (1983). He has never objected that any instruction was constitutionally deficient, and the trial court in fact used some of the proposed instructions submitted by advisory counsel in Harding's behalf. In no manner did advisory counsel, in the jury's presence, contradict Harding's wishes or compete with him. That is why Wiggins v. Estelle, 681 F.2d 266 (5th Cir. 1982), rehearing denied, 691 F.2d 213 (5th Cir. 1983), cert. granted, ____U.S.____, ____ S.Ct.____, 75 L.Ed.2d 430 (1983), lends no support to Harding's contentions. Harding maintains that any tangential infringement of his right to self-representation entitles him to a new trial without his showing prejudice. He must take that position because he can show no prejudice. Even the case upon which he relies, Wiggins, supra, applied a harmless error rule in determining whether alleged violations warranted reversal. 681 F.2d at 274. Harding had the opportunity to submit proposed intructions and did not do so; to argue that he had the power to exclude his advisory counsel, acting as an officer of the trial court at the court's request, from submitting instructions, is inane. Respondent maintains there was no violation of the right to self-representation, and, if there was, it was harmless beyond any doubt in view of the insuperable evidence in this case, and the uncontested correctness of the trial court's instructions.

B.

PHOTOGRAPHS.

The Arizona Supreme Court correctly determined that Harding, after an initial objection to some photographs during a pretrial hearing, withdrew his objection to all the photograpns. State v. Harding, supra, at 396. That factual determination by a state supreme court would be

entitled to a presumption of correctness in a federal habeas proceeding. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); 28 U.S.C. § 2254(d). Yet, Harding tells this Court that the Arizona Supreme Court does not have the common sense to read the entire record, which that court must do by statute to search for fundamental error, and to determine whether in fact Harding attempted to recant his withdrawal. Harding never renewed his objection to the photographs; he now finds himself in the ironic position, in this argument, of telling this Court that his advisory counsel renewed the withdrawn objection. Harding, however, never joined that attempted renewal, and he adamantly insisted upon being referred to both pretrial and at trial as the "attorney of record." It simply does not do to tell this Court in the previous argument that his advisory counsel violated his right to self-representation by submitting, in-camera, proposed jury instructions, then whirling about 180 degrees in this argument to rely upon his advisory counsel to resurrect an objection that Harding himself had withdrawn. Would not that also have violated his right to self-representation since he personally, as counsel of record, withdrew the objection?

The Arizona Supreme Court did say that it felt some of the pictures were more prejudicial than probative. But Harding's personal withdrawal of objection to them did not preserve the issue for appeal. To circumvent that, Harding tries to convince this Court that the Arizona Supreme Court did not recognize fundamental error. The Arizona Supreme Court found no fundamental error. Harding's guilt was overwhelmingly established by the evidence. Even fundamental error may be harmless. Thus, even if one wished to postulate, arguendo, that the photographs were

fundamental error under Arizona case law, the Arizona Supreme Court obviously and implicitly found their admission harmless beyond a reasonable doubt. That court applies the same harmless error test this Court recently enunciated in United States v. Hasting, supra. State v. Adamson, ____Ariz.____, 665 P.2d 972, 977-78 (1983). Respondent emphasizes, however, that the Arizona Supreme Court did not find the introduction of the photographs fundamental error, and did find that Harding had withdrawn objection to them. That was a state ruling on state evidentiary law, and Harding shows no violation of federally protected rights.

C.

SHACKLES

The Arizona Supreme Court fully explained why ankle shackles were justified in this case, noting that Harding had threatened his defense counsel (and any subsequent replacement), and anyone connected with the trial, and had engaged in assaultive behavior while in custody on these charges. State v. Harding, 670 P.2d at 393-94; (Attachment). These threats of violence to anyone connected with this trial immediately distinguish this case from People v. Burnett, 168 Cal.Rptr. 833, 111 Cal.App.3d 661 (1980). Even California recognizes that contemporaneous threats justify shackling. People v. Kimball, 5 Cal.2d 608, 55 P.2d 483 (1936). When one is the defendant, and threatens harm to his advisory counsel and other officers of the Court, there is no right not to have ankle shackles or to be allowed total freedom of movement. Such a conclusion as that advocated by Harding would lead to the absurd result that trial courts must leave totally unfettered every defendant who wishes to represent himself regardless of

threats he has made to those participating in the trial. That has never been the law expounded by this Court, California, or Arizona. The trial court minimized the effect of the ankle shackles by seating Harding, before the jury entered, at a desk with a closed front and sides. Harding had no waist chains or handcuffs, only ankle shackles. He could have stood behind the desk and addressed the jury, but did not wish to do so. An attorney's mobility before the jury has no necessarily corresponding positive impact upon them -- indeed, it may at times distract. If Harding had been completely unrestrained, that would not have changed the evidence against him in the slightest.

CONCLUSION

Harding presents no federal question to this Court. His attempts to establish a violation of the right to self-representation are strained. With respect to the other points, he invites this Court to tell the Arizona Supreme Court that it does not recognize fundamental error when it sees it or know how to apply the test for harmless error. None of this has merit, and the Court should deny the writ.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

JACK ROBERTS
Assistant Attorney General

Attorneys for RESPONDENT

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, being first duly sworn upon oath, deposes and says:

That he served the attorney for the appellant in the foregoing case by forwarding two (2) copies of RESPONSE TO PETITION FOR A WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

WILLIAM G. LANE
627 North Swan Road
Tucson, Arizona 85711

Attorney for PETITIONER

this 28th day of December, 1983.

Jack Roberts
JACK ROBERTS

SUBSCRIBED AND SWORN to before me this 28th day of December, 1983.

Chris L. Piske
NOTARY PUBLIC

My Commission Expires:

October 28, 1985

CR34-165
3306D clp

THE COURT: Let' see, before me yet is the matter of his representing himself.

MR. WILD: Right. Your Honor, I think we may need to be more specific. Mr. Cooper has indicated to Judge Druke, I don't know the specifics of what was said and I don't whether Mr. Cooper wanted to make any specific statement about what was said for the record, it is simply my understanding that Donald Harding has made a gereralized threat to, as he said, all persons involved in his case. I don't know that there is anything more specific to that, any named individuals or specific individuals other than all court personnel and all people, and I take it that means anybody who is here.

My only request is that both deputies simply be in the immediate presence of Donald Harding at all times during the motions and trial.

THE COURT: Yeah. Was it in a very generalized fashion in that matter, is that what he said?

MR. COOPER: Well, without revealing the specifics, yes, Your Honor.

THE COURT: It wasn't a threat directed at any particular person?

MR. COOPER: Well, there were a couple. One was a basic general threat, and the other -- yes, there were specific threats.

THE COURT: Okay.

MR. WILD: Your Honor, if I may as an aside, on a civil matter there was -- there was a case out of California where a psychiatrist had information that an individual had threatened specific individuals and he failed to communicate that either to the police or to those threatened individuals. One of those individuals did come to harm after that, I believe, and the individual who failed to reveal was later held civilly liable together with the university system in California to reveal. I wouldn't want Mr. Cooper to be subjected to that if he knew of a specific named individual and that was not advised.

THE COURT: You wish to --

MR. COOPER: I would probably have to sue myself, Your Honor. I think that would also go for, according to Mr. Harding, any attorney involved in his defense.

THE COURT: Okay. And those -- those were the specifics, you and anyone else who may take your place?

MR. COOPER: Essentially, Your Honor.

THE COURT: All right. Mr. Harding, are you willing to waive in writing an attorney in this matter?

MR. HARDING: Yes, I am.

THE COURT: I am not persuaded yet that you shouldn't have an advisory counsel. Are you still --

MR. COOPER: Judge, we are not talking about the opening as Mr. Wild just said, we are talking now at the closing.

MR. HARDING: Closing, Your Honor.

THE COURT: I want the record to show it, just in case it hasn't been fuly made yet, the reason the Court has ordered that the defendant remain shackled, one, there was a report in Court here at the commencement of this trial of threats Mr. Harding has made upon anyone connected with this trial, and particularly defense counsel; and, two, the Court has heard of incidents at the jail in which Mr. Harding was allegedly involved; three, just the other day it was reported to the Court that Mr. Harding had indicated to the Deputy Sheriffs who were accompanying him back to the holding area that he would never serve any time on these offenses and that he would do something that would necessitate his being killed by them before he was to serve any time. Those are the reasons which the Court has consistently denied Mr. Harding the -- his request to be unshackled.

MR. HARDING: Your Honor, I would like it on the record as denying making any